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IN THE

# Supreme Court of the United States

October Term, 1948

No. 247

RAILWAY EXPRESS AGENCY, INCORPORATED,
*Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Railway Express Agency, Incorporated, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in this proceeding.

## OPINIONS BELOW

The opinion of The Tax Court of the United States (R. 4-39) is reported at 8 T. C. 991. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 65-75) is not yet officially reported.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 19, 1948. (R. 75) Jurisdiction of this Court is invoked under section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, section 347 (a)) and under section 1141 (a) of the Internal Revenue Code (U. S. C. A., Title 26, section 1141(a)).

## QUESTIONS PRESENTED

1. The petitioner is a railroad-owned, joint facility organized for the purpose of engaging in express transportation in its own name, but, nevertheless, acting in fact only as the agent of its railroad principals and accounting to them under the terms of an operating agreement for all of its revenues after payment of expenses. The petitioner has only a nominal capital stock of 1,000 shares of no par value. This stock is held by 70 Class 1 railroads and merely represents voting rights. Its operations are conducted under identical contracts with over 400 railroads, and the revenues are divided not as dividends but among all participating railroads, stockholders and non-stockholders alike, on the basis of their participation in the gross express business handled. The principal question presented is whether any part of the receipts of the petitioner from express operations for 1937 and 1938 constituted income taxable to it under the Revenue Acts of 1936 and 1938. Conversely, the question is whether the income from express operations in its entirety, whether distributed or not, belonged to and was taxable directly to the railroad principals under the agency contracts.

2. An alternative question is whether for 1937 the petitioner was entitled to the credit granted by section 26 (c) (1) of the Revenue Act of 1936 in the computation of the surtax upon undistributed net income imposed by section 14 of that Act.

## SUMMARY STATEMENT OF FACTS

The petitioner is a corporation organized on December 7, 1928 as an integral part of a plan by which the railroads of the United States took over the express business of the country for their own account. (R. 10; Ex. 3-C, pp. 5-16)

**Transition of express business from independent to railroad ownership**

From September 1, 1920 until February 28, 1929, the express business of the country was handled by American Railway Express Company (hereinafter referred to as "American") under uniform contracts with practically all of the railroads in the United States. American operated as an independent company for its own account. (R. 6) At the time of the approval of that arrangement, two members of the Interstate Commerce Commission dissented. One of them stated "that the time has come when the carriers should give serious and further consideration to the question of conducting the express business themselves. * * * They should no longer permit outside agencies to transact it." (59 I. C. C. 459, 469)

The uniform contracts between American and the railroads contained a provision to the effect that if American did not continue express operations after their expiration on February 28, 1929, it would sell to each railroad at cost, less depreciation, all property of American used in the express business located on the lines of such railroad. (R. 8)

For some years prior to 1929, the railroads acting through appropriate committees had been making a detailed study of the future of the express business after the contractual relations with American should end on February 28, 1929. (R. 6) As a result, a "Report and Plan For Future Conduct of Express Business" was prepared, adopted and carried out. (Ex. 3-C) The object of the

Plan was declared to be as follows:

> "The object sought to be attained by the plan is to make the future express agency a railroad-owned joint facility engaging in express transportation in its own name, but nevertheless acting in fact only as the agent of its railroad principals and accounting to them under the terms of the operating agreement (Exhibit D) for all of its revenues after payment of expenses. This relationship will make the railroads transporters of express as they are of freight with a consequent like status before commissions and courts." [Ex. 3-C, p. 2]

The Report and Plan outlined the procedure to be followed, contained the legal forms to be executed, including a certificate of incorporation and by-laws for a new express agency and the form of a new operating agreement to be executed between all participating railroads and the new express agency. (Ex. 3-C)

Four individuals, being the presidents of the Pennsylvania, New York Central, Union Pacific and Santa Fe railroads, were designated as agents to carry the Plan into effect. (Ex. 3-C, p. 5) The most important steps taken by these individual agents were (1) the negotiation of an agreement with American for the purchase of its express properties and equipment for over $30,000,000 (R. 10) which was to be paid with borrowed money and which was to be repaid out of the express revenues of the future (R. 17), (2) the organization of the new express agency (the petitioner) (R. 10), (3) the securing of approval of the Plan by the Interstate Commerce Commission to the extent required by law (R. 11; 150 I. C. C. 423), and (4) the assignment of their rights under the agreement with American to the new express agency. (R. 10) Pursuant to this assignment, title to the properties of American was acquired in the name of the petitioner. (Ex. 3-C, pp. 57-58)

**The capital structure, stockholdings and management of the petitioner**

The capital of the petitioner is limited to 1,000 shares of no par value stock which was originally allotted to 86 Class 1 railroads at $100 per share upon the basis of the express business done by them in the past. Participation was thus limited because of the impracticability of joining the very large number of other roads which performed in the aggregate only about 2 per cent of the express business. The stock is non-transferable except to the petitioner or to a successor of the holder in the case of consolidation, merger or purchase. (R. 7-8)

The Plan provided that "the capital stock should not represent any substantial equity in the property but merely the voting rights" and that "the distribution of the stock does not affect the distribution of earnings from the express business, which will be distributed under and in accordance with the operating contract, rather than as dividends". (Ex. 3-C, p. 8)

The petitioner was managed by a Board consisting of 15 Directors, 14 of whom were selected by railroads from prescribed geographical groups and one selected at large. (R. 9)

**The operating contract**

At all times since March 1, 1929, petitioner has conducted the express business under separate identical contracts known as the Express Operations Agreement with substantially all the railroads of the United States. During 1937 and 1938 over 400 railroads, including 70 Class 1 railroads among which the 1,000 shares of capital stock were then distributed, were parties to that Agreement. (R. 11-12; Ex. 3-C, pp. 57-87)

The broad object of the Agreement was stated in the basic Plan as follows:

> "The new operating agreement is drafted with the object of making the several railroads, parties to it, common carriers of express shipments and principals in this respect, operating in the name of their common agent, the New Express Company. The Express Company will be in effect a joint facility agency, which, after deductions required for expenses and other charges, will distribute all revenues received by it among its principals. This will accomplish the change in the relationship of the railroads to the express business which has long been advocated by members of the Interstate Commerce Commission". [Ex.3-C, p.14]

The accounting between the petitioner and the railroads is specified in Article V of the Agreement. For the purpose of that accounting, the various items of income and deductions are as defined in what is known as the Uniform System of Accounts for Express Companies prescribed by the Interstate Commerce Commission in 1914. The railroads are divided into four geographical groups and with the exception of revenues from carload shipments, all accounting by the agency to the railroads is done on a group basis. The agency accounts directly to each railroad upon carload shipments for 85% of the gross revenues accruing on its lines. The remaining 15% from such carload shipments, all revenue from less than carload shipments and all other income is pooled for the benefit of the railroads in each particular group. (R. 12-13; Ex. 3-C, pp. 66-75)

Determinations of divisible revenue are made monthly. From the sum total of every conceivable type of income from all sources, there is deducted all expenses of operation, including depreciation on the physical properties. (R. 13) The balance is designated as "Rail Transportation Revenue" and is distributed monthly to the contracting railroads in each group in the proportion that the gross revenues earned on the lines of each such carrier bears to the gross express revenues earned on the lines of all such carriers in the group. (Ex. 3-C, pp. 73-74)

The Agreement contains various provisions for the adjustment of errors in the statement of any of the petitioner's accounts and for resolving disputes between the parties. (R. 15-16; Ex. 3-C, pp. 74, 80-81, 83-85) In many instances, the Agreement specifies as between the parties as to whether the petitioner and, therefore, all railroads in the group concerned or a particular railroad is to bear an item of expense or loss. (R. 17; Ex. 3-C, pp. 78-79, 81-82) No provision is made in the Agreement for compensating the petitioner for its services as agent. The petitioner has never paid any dividends to its stockholders. (R. 19)

**The tax controversy**

For each year since the beginning of the present arrangement, the petitioner filed a Federal income tax return. For the years 1929 to 1936, inclusive, it paid no taxes.[1] That means the Rail Transportation Revenue was taxed to the railroads and not to the petitioner. No question arose concerning the taxable status of the petitioner or the type of return it should file until 1937 and 1938 and for those years the Rail Transportation Revenue actually distributed in the amounts of $50,420,994.05 and $57,948,-646.62, respectively, were deducted by the petitioner and taxed to the carriers. (R. 21-22)

The present controversy arose out of a difference between the requirements of the Interstate Commerce Commission and of the Treasury concerning depreciation. In determining Rail Transportation Revenue, the Express Operations Agreement provides for the deduction of depreciation at the rates used on February 28, 1929 by the petitioner's predecessor or as fixed by the petitioner's Board of Directors or by the Interstate Commerce Com-

[1] This is undisputed at pages 77-78 of the typewritten transcript on file with the Circuit Court of Appeals. That transcript was not brought to this Court in connection with this petition for certiorari.

mission. (Ex. 3-C, p. 72) On May 19, 1936, the Interstate Commerce Commission issued an order directing that effective January 1, 1937 the petitioner shift from the unit method of accounting for depreciation to the group method as described therein. The group method was accordingly employed by the petitioner for 1937 and 1938 and this resulted in substantially increased depreciation deductions. The petitioner accounted to its contracting railroads on that basis. The same deductions for depreciation were taken in its Federal tax returns for 1937 and 1938. The Commissioner of Internal Revenue reduced these amounts to the extent of $383,994.07 and $274,779.70, respectively, and treated such amounts as income taxable to the petitioner. The deficiency asserted by the Commissioner resulted solely from that determination. The correct depreciation for tax purposes is not in dispute.[2] (R. 19-20, 52)

Although the deficiency asserted by the Commissioner resulted solely from the depreciation adjustment, two other items were placed in issue. In 1937 and 1938, the agency paid small amounts as fines for violations of municipal ordinances, customs regulations, etc. Capital losses were also incurred on sales of property. (R. 20) While these fines, in their entirety, and the net capital losses in excess of $2,000 were non-deductible for tax purposes, they were, nevertheless, deducted in full by the petitioner in computing Rail Transportation Revenue. In other words, in the initial accounting between the petitioner and the railroads, the agency was permitted to restore out of gross express revenues the amount of these fines paid and the capital

[2] Because of the conflict between the requirements of the Interstate Commerce Commission and the Treasury, the Commission by two orders in 1945 vacated its earlier order and granted permission to the agency to account for depreciation by including in its accounts amounts found by the Bureau of Internal Revenue to be allowable, and it also granted permission to restate the accounts in this manner retroactively to January 1, 1937. No retroactive action has, as yet, been taken under these orders because of the pendency of this proceeding. ( R. 20, 54-55)

losses incurred. These restored amounts make up the entire income reported by the petitioner in its returns for 1937 and 1938. Since these two classes of income are in exactly the same category as the disallowed depreciation, the petitioner challenged the correctness, not only of the Commissioner's determination with respect to the disallowed depreciation, but also the correctness of the returns filed.

**Contention of petitioner**

Petitioner contends that it is the mere agent of its railroad principals, that the express business, the property used therein and the income therefrom belong to the railroads and that the burden of tax upon all income however arising under the Express Operations Agreement must fall directly upon the railroads and not upon their common agent. It should report to the Treasury as a fiduciary showing (1) the annual financial results of its operations, and (2) the distributable shares of express revenues belonging to each railroad whether distributed or not.

**The decision of The Tax Court**

The Tax Court in an unreviewed opinion by a single judge concluded that the revenues from the express business distributed to the railroads by petitioner were compensation for services rendered by them to petitioner and not a mere division of the profits from the railroads' business (R. 29); that the petitioner was the absolute owner of the properties utilized in the express business (R. 26); and that it occupied the relationship with the railroads of an independent contractor with income of its own (R. 30). The petitioner was accordingly held taxable in full upon the income here in question. (R. 32, 37) The alternative issue was decided in favor of the petitioner. (R. 37-39) Both parties appealed.

**The decision of the Circuit Court of Appeals**

The Circuit Court of Appeals affirmed with respect to the main issue and by a divided court reversed with respect to the alternative issue. After stating the contentions of the parties and without deciding whether a true principal and agency relationship existed, the court concluded that its earlier decision in *Commissioner v. National Carbide Corporation*, 167 F. (2d) 304, was "squarely to the contrary of the position taken by the Agency". (R. 69) Following this disposition of the issue, the court recited with approval some of the reasoning of the Tax Court and further concluded that "the depreciation items were deducted by the Agency for its own benefit as the owner of depreciating property" and that it was taxable upon the excess of the amount deducted in its accounting to the railroads over that allowable for tax purposes. (R. 70-71) In connection with the alternative issue, the court described this excess as a "windfall" to the agency. (R. 73)

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that amounts deducted by the petitioner in its accounting to the railroads, which are not deductible in computing net income under the revenue laws, belonged to the petitioner and are taxable to it.

2. In holding in effect that a true principal and agency relationship does not exist between the petitioner and the railroads, parties to the Express Operations Agreement.

3. In holding that a corporation is taxable upon the net income from its operations, regardless of the fact that it is but an agent and that as such its receipts belong to its principals.

4. In holding that in computing undistributed net income for the purpose of the surtax imposed by section 14

of the Revenue Act of 1936, petitioner was not entitled to the credit granted by section 26 (c)(1) of that Act.

## REASONS FOR GRANTING THE WRIT

1. To the extent that the Circuit Court of Appeals held that the petitioner is not the common agent of the railroads, its decision is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Bowles v. Railway Express Agency, Inc.*, 65 F. Supp. 852, *aff'd., sub nom. Fleming v. Railway Express Agency, Inc.*, 161 F. (2d) 659 (1947).

The principal basis for the decision below was the court's reliance upon *Commissioner v. National Carbide Corporation*, 167 F. (2d) 304 (C. C. A. 2), which is now pending in this Court on a petition for certiorari (No. 151). However, the court went further and held that the income in question belonged to the petitioner. (R. 71) The legal effect of that conclusion is that the petitioner is not a mere agent of the railroads but occupies a position under the operating contract by which it can divert receipts to its own uses and to its stockholders as such. The petitioner having served the railroads for nearly 20 years disclaims any such authority.

The legal relationship between the petitioner and the railroads was squarely raised in *Bowles v. Railway Express Agency, Inc.*, 65 F. Supp. 852. There, the Price Administrator brought suit against the agency for treble damages and for an injunction claiming that the rate paid to the agency by the Illinois Central Railroad for certain miscellaneous freight services violated the maximum price regulations. The agency contended that the services performed by it did not constitute the sale of services for a price. The court dismissed the complaint holding that the services were rendered as agent and not as a seller. In so holding, the district court said:

> "It is the opinion of the court that the defendant, the agent of the railroads subscribing to the Express Operations Agreement for the conduct of the express transportation business and for the collection and distribution of the revenues accruing therefrom (Article II, Sec. 1 of the Agreement) is likewise the agent of the carriers in the performance of the miscellaneous transportation services pertinent to this case. The defendant has a paid-in capital of $100,000. It has neither a paid-in nor an undistributed surplus. Yet it did a gross business for the year ending on December 31, 1943 of over $350,000,000. The capitalization thus is purely nominal. The defendant does not stand on its own feet as a financially independent corporation, but draws its strength from the fact of its being the exclusive agent of the subscribing railroads in the express transportation business. Its revenues, after items of expense are deducted, are distributed to the subscribing railroads in proportion to their share of the total express business carried on their lines. The Agency is thus a kind of cooperative, although its membership is not the sort contemplated by the Rochdale pioneers. The relationship between a cooperative and its members is generally regarded as one of agency. Bowles v. Inland Empire Dairy Association, D. C. Wash., 1943, 53 F. Supp. 210, and cases cited therein." [65 F. Supp. 852, 854]

On appeal, the Circuit Court of Appeals for the Seventh Circuit affirmed and, as to the agency issue, adopted as its own the decision of the district court. (*Fleming v. Railway Express Agency, Inc.*, 161 F. (2d) 659) If, as that case holds, the petitioner is but an agent so far as the Emergency Price Control Act is concerned, it is likewise an agent for other purposes. The tax laws have added nothing to the law of agency.

To the extent that the court below held that a true principal and agency relationship does not exist between the railroads and the petitioner, its decision is in conflict with the plan under which the railroads took over the express business in 1929. The Legal Committee that drafted the

Plan stated that the object was "to make the future express agency a railroad-owned joint facility engaging in express transportation in its own name, but nevertheless acting in fact only as the agent of its railroad principals and accounting to them under the terms of the operating agreement * * * for all of its revenues after payment of expenses". (Ex. 3-C, p. 2) In submitting the new operating agreement, the Committee again stated that the agreement was drafted "with the object of making the several railroads, parties to it, common carriers of express shipments and principals in this respect, operating in the name of their common agent, the New Express Company". (Ex. 3-C, p. 14) The decision below holds in effect that the railroads failed in their main objective.

That it was intended that the properties acquired from American and taken in the name of the petitioner nevertheless belonged to the railroads is shown by the first recital of the operating agreement as follows:

> "WHEREAS, the Rail Company has united with other carriers operating railroads in the continental United States to acquire through their own express agency the properties of the American Railway Express Company employed in the express business, and to conduct through such express agency the future operations of the express business;" [Ex. 3-C, pp. 57-58]

The Interstate Commerce Commission thought that the role designed for the New Express Company was that of an agent. (*Securities and Acquisition of Control of Railway Express Agency, Inc.*, 150 I. C. C. 423, 429 (1929); *Railway Express Agency, Inc., Determination of Status*, 21 M. C. C. 161, 163 (1939))

To the extent that the court below held that a true principal and agency relationship does not exist between the railroads and the petitioner, its decision is in conflict with an Arbitrators' Decision rendered on July 15, 1948, by

Judge Kimbrough Stone, John W. Davis, and Justice Owen J. Roberts *In the Matter of The Arbitration of Disputes Under Railway Express Operations Agreement.*[3] That proceeding involved the arbitration of conflicting contentions of a large number of railroads arising out of the administration of the Express Operations Agreement during the war. The arbitrators found that the agency was the common agent of the railroads. (Pp. 3, 15, 16, 23, 29 and 41) In fact, some of the issues raised by several of the railroads, such as "Account Stated", "Voluntary Payment", and "Laches", were disposed of by the application of the law of agency. The Santa Fe Railroad presented a separate claim for damages on account of diversions of traffic from its lines. In denying this claim, the arbitrators said, in part: "The Agency has no funds of its own. As agent it holds any monies remaining after the payment of its expenses, for distribution amongst the carriers." (P. 41) This is directly contrary to the decision below that the petitioner acquired for its own benefit a "windfall" by reason of excessive deductions for depreciation. (R. 73)

Thus, despite the implication to the contrary contained in the opinion below (R. 70-71), there is squarely involved here the legal effect taxwise of a principal and agency relationship between two or more corporations. This in turn involves the correctness and applicability of the sweeping rule announced by the court below in *Commissioner v. National Carbide Corporation*, 167 F. (2d) 304, which the court applied in the instant case.

2. The legal effect in tax cases of a bona fide principal and agency relationship between two or more corporations is a matter of public importance in the administration of the tax laws which should be settled by this Court.

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[3] Since the Arbitrators' Decision is not reported, copies have been filed with the Clerk as an appendix to this petition.

In 1943, this Court in *Moline Properties, Inc., v. Commissioner,* 319 U. S. 436, and in *Interstate Transit Lines v. Commissioner,* 319 U. S. 590, granted certiorari because of uncertainties in the area of important federal tax law involved therein.

*Moline Properties, Inc., v. Commissioner, supra,* involved a contention that the entity of a corporation should be disregarded. In refusing to disregard the corporate entity, this Court pointed out that "there was no actual contract of agency, nor the usual incidents of an agency relationship". (P. 440) This Court there implied that the result might have been affected by such a relationship. At least, this Court left the question open.

*Interstate Transit Lines v. Commissioner, supra,* involved the effect of a contract by which a wholly-owned subsidiary corporation agreed to operate solely for its parent's benefit and the parent was to receive all profits and to reimburse for any deficits. Both the majority and dissenting opinions recognized that the contract should be given effect for tax purposes. The majority decision disallowed the taxpayer's claim for the deduction of a deficit paid for one year because of a defect in proof. The three dissenting justices would have allowed the deduction because the agreement was found to be a common-sense business arrangement not entered into for the purpose of avoiding taxes.

The court below in *Commissioner v. National Carbide Corporation,* 167 F. (2d) 304, contrary to the implications of the decisions of this Court referred to above, held broadly that where for business reasons a corporation is used it is taxable upon the income from its operations regardless of a principal and agency, or other contractual relationship between that corporation and its parent. The court below held that its decision in that case was squarely contrary to the position taken by the agency in the instant case. The *National Carbide Cor-*

*poration* case is pending in this Court on a petition for certiorari (No. 151), filed July 14, 1948. The importance of the question raised by that decision is concisely stated at pages 10 to 14 of the petition there filed.

The effect to be given in tax cases to a principal and agency relationship between two or more corporations is more squarely presented in this case than in the *National Carbide Corporation* case. That case, as did the cases of *Southern Pacific Co. v. Lowe*, 247 U. S. 330, *Moline Properties, Inc., v. Commissioner, supra,* and *Interstate Transit Lines v. Commissioner, supra,* in this Court, involved a relationship between a parent and wholly-owned subsidiaries. In such cases, it may be argued that since the parent is entitled to the earnings of its wholly-owned subsidiary by virtue of its stock ownership, the diversion of earnings by a contract not entered into at arms' length should not be permitted. (*Cf., Higgins v. Smith,* 308 U. S. 473.) Here, however, the petitioner's nominal stock is held by 70 railroads and merely represents voting rights. Under the Express Operations Agreement, it is the common agent of over 400 competing railroads. As between the railroads, parties to the joint venture, it was an arms' length arrangement. The earnings of the express business are divided, not as dividends, but among all participating railroads on the basis of the proportion of the total business handled over their lines.

In the application of the tax laws, this Court, so far as we are advised, has never refused to give legal effect to a bona fide contractual relationship under such circumstances. As shown above, the implications of its decisions are to the contrary.

3. The taxable status of the arrangement between the petitioner and over 400 railroads, under which substantially all the express business of the country is handled, is of itself a matter of public importance which should be settled by this Court.

The decision below, instead of clarifying the taxable status of the petitioner, leaves the matter in a state of uncertainty and confusion. The gross receipts from the express business have ranged from $163,091,039 in 1937 to $443,925,140 in 1947. For the years 1937 and 1938, there was divided among the carriers as Rail Transportation Revenue under the terms of the contract $50,420,996.05 and $57,948,946.62, respectively. (R. 22) These amounts were taxed to the carriers and not to the petitioner. In fact, it will not be disputed that in all years from 1929 to date the Commissioner has treated Rail Transportation Revenue in this manner. Admittedly, such revenue is not distributed as dividends. (R. 19) Under the *National Carbide Corporation* case, which the court held applicable here, all receipts by a corporation, regardless of its contractual obligations to the contrary, must be treated as gross income belonging to it for tax purposes. If the receipts of the express business are treated as gross income belonging to the petitioner, then it must find specific statutory authority for any deductions therefrom and such provisions are strictly construed. (*Interstate Transit Lines v. Commissioner,* 319 U. S. 590, 594)

The Tax Court taking cognizance of this problem suggested that the divisible Rail Transportation Revenue might be deducted as business expenses and paid as compensation for the services rendered by the railroads to the petitioner. (R. 22) This wholly unrealistic approach implies that the express business belongs to the petitioner and not to the railroads, and that the petitioner is an independent contractor and not an agent. The Circuit Court of Appeals, however, by applying the sweeping rule, announced in the *National Carbide Corporation* case, holds in effect that the receipts of the express business constitute gross income of the petitioner, even if a principal and agency relationship does exist. If such a relationship exists, then the amounts distributed by the petitioner con-

stitute payments by an agent accounting to its principals and not business expenses in the form of compensation to the railroads for services rendered by them to the petitioner.

4. If the petition for a writ of certiorari is granted, its scope should not be limited. This Court should keep open for review, the alternative issue decided by the court below, namely whether the petitioner was prohibited by a written contract from distributing dividends so as to entitle it to the credit granted by section 26 (c)(1) of the Revenue Act of 1936. This issue becomes material only if it is held that petitioner realized taxable income for 1937. For the reasons stated by The Tax Court (R. 37-39) and by Judge Learned Hand in his dissenting opinion (R. 74-75) the petitioner was prohibited by Article V, Section 4(i) of the Express Operations Agreement from distributing any part of its earnings as dividends. (R. 59; Ex. 3-C, pp. 72-73)

## CONCLUSION

This petition for certiorari should be considered in connection with the pending petition in the *National Carbide Corporation* case (No. 151). Both petitions should be granted and the cases should be argued together.

Respectfully submitted,

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